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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1533

CARL A. COPPOLINO,
PETITIONER,

v.

STATE OF FLORIDA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

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STATE OF FLORIDA,
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PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the District Court of Appeal of Florida, Second District, affirming his conviction for second degree murder.

Citation to Opinions Below

The opinion of the District Court of Appeal of Florida, Second District is reported at 223 So. 2d 68, and is set forth in our Appendix, pp. 21-37. The order dismissing the petitioner's Appeal in the Supreme Court of Florida is set forth in our Appendix. p. 38.

Jurisdiction

Jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

Questions Presented

1. Whether the due process requirement of proof beyond a reasonable doubt of every fact necessary to constitute murder is violated, where proof of Corpus Delicti (particularly as to cause of death) depends solely upon expert scientific testimony, which cannot be said to reach that standard?

2. Whether the due process requirement of poor beyond a reasonable doubt of every fact necessary to constitute the crime is violated, where, upon a trial of an anesthesiologist for first degree murder by the premeditated and knowing injection of a fatal dose of a paralyzing compound, the application of a state statute permits a conviction of second degree murder, though there be no evidence of the crime of second degree murder?

3. Whether the State of Florida committed federal constitutional error in applying its State Standard of Harmless Error in finding that testimony of prior crimes of adultery, and of a statement of the petitioner's stepdaughter, given in rebuttal by a third person, that: "I wouldn't be surprised if he killed his first wife" was harmless error.

Constitutional Provisions and Statutes

Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FLORIDA STATUTE § 919.14

Determination of degree of offense— If the indictment or information charges an offense which is divided into degrees, without specifying the degree, the jurors may find the defendant guilty of any degree of the offense charged; if the indictment or information charges a particular degree the jurors may find the defendant guilty of the degree charged or of any lesser degree. The court shall in all such cases charge the jury as to the degrees of the offense.

FLORIDA STATUTE § 924.33.

When judgment not to be reversed or modified. — No judgment shall be reversed unless the appellate court after an examination of all the appeal papers is of the opinion that error was committed which injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.

Prefatory Note

Dr. Carl Coppolino was indicted and tried for first degree murder. The doctor is an anesthesiologist. The theory of the State's case was that he premeditatively injected his wife with succinylcholine chloride, a slow acting paralytic agent which causes the diaphragm to become so relaxed that death ensues by suffocation. This theory, of a trained anesthesiologist, obtaining and drawing the deadly agent into a hypodermic, injecting it, and then permitting death to come to his wife, while he could have interrupted by artificial respiration, must be a classic of first degree murder. *Yet,* to this design, the jury returned a verdict of second degree murder.

The petitioner brings to this Court his constitutionally

founded complaints, that because the jury could not possibly have found the cause of death beyond a reasonable doubt (Reason I), and influenced in part by inflammatory and incompetent testimony (Reason III), it compromised to a verdict of second degree murder, condoned by a state statute which allows conviction on a crime for which there is no evidence (Reason II).

Statement of the Case

On July 25, 1966 an indictment (set forth in Appendix, pp. 39-40) was returned against the petitioner, by the Grand Jurors of the County of Sarasota, Florida. The indictment charged that the petitioner inflicted upon his wife "certain mortal injuries and a mortal sickness, a further description whereof is to the Grand Jurors unknown." Pursuant to order of Court, the State subsequently filed a Bill of Particulars (set forth in Appendix, p. 41) identifying the cause of death as "a certain drug commonly called succinylcholine." The petitioner entered a plea of not guilty, and his trial before a judge and jury was commenced on April 3, 1967. On April 28, 1967, the jury returned a verdict of guilty of second degree murder, and the petitioner was forthwith sentenced to life imprisonment. (Tr. 2516-19).[1] On November 8, 1968, the petitioner's conviction was affirmed by the District Court of Appeal of Florida, Second District. (App. pp. 21-37). The petitioner appealed to the Supreme Court of Florida, and on December 9, 1969 that Court dismissed the petitioner's appeal without consideration of the merits. (App. p. 38). On March 2, 1970, Mr. Justice Black entered an order extending the time for filing a Petition for Writ of Certiorari in this matter to and including May 8, 1970.

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[1] Tr. refers to Transcript of Trial.

Statement of the Facts

At about 6 o'clock on the morning of August 28, 1965, Dr. Juliet Karow, a Sarasota physician, received a telephone call from the petitioner urging her to come to his home quickly. (Tr. 666). Dr. Karow immediately complied. When she arrived, the petitioner met her at the door and announced, "She is dead." (Tr. 667). The petitioner led the doctor to his wife's room, where Dr. Karow found Mrs. Coppolino lying in her bed on her right side with her right arm under her body and both fists clenched. (Tr. 667). She was dead. The petitioner related that he had awakened and found his wife dead. (Tr. 670). The petitioner informed Dr. Karow that his wife had suffered all the previous day from chest pains, that she had been somewhat nauseated and had taken some antacid pills. (Tr. 664). Dr. Karow concluded that Mrs. Coppolino had died from a coronary occlusion, and signed the death certificate to that effect. (Tr. 655). Before leaving the petitioner's home, Dr. Karow, in the petitioner's presence, called the county medical examiner, who informed her that police would pick up the body and deliver it for an autopsy. (Tr. 710). The petitioner made no comment or objection to the autopsy. (Tr. 711).

The following day, August 29, 1965, the medical examiner decided that an autopsy was not necessary, and the body was taken to a local funeral home where it was embalmed. Pursuant to the request of the deceased's father, the remains of Mrs. Coppolino were shipped to New Jersey for burial in the family plot. (Tr. 1632-33).

Some three and one-half months thereafter, the remains of Carmella Coppolino were exhumed and delivered to Dr. Milton Helpern, Chief Medical Examiner of the City of New York. (Tr. 858). On December 17, 1965, Dr. Helpern performed an autopsy of the remains. (Tr. 861).

In the course of his exterior examination of the body, the doctor found a small puncture wound in the left buttock, and upon excision found a track consistent with a needle puncture going into the subcutaneous fat. (Tr. 868-67). Dr. Helpern was unable to determine the cause of death. (Tr. 861).

Following his autopsy, Dr. Helpern turned over certain portions of the remains to a Dr. Umberger, a toxicologist in his office, requesting that he conduct a "general unknown" test in an attempt to determine the presence of drugs and poisons in the body tissue. (App. 22). The series of tests were negative. (Tr. 992). However, pursuant to Dr. Helpern's further instructions, Dr. Umberger then attempted to discover a method "whereby he could determine if unusual amounts of the component parts of succinylcholine chloride were present in the body tissues." (App. 22). As the Court stated, "several witnesses, including those called by the State, testified that prior to the performance of the tests in question it was believed impossible by medical scientists to demonstrate the presence of succinylcholine chloride or its component parts in the body." (App. 23).

Following experimentation, which continued up to the very day of trial, Dr. Umberger testified equivocably, in response to a prosecution question intended to elicit "with a reasonable medical certainty whether . . . [the doctor's] findings indicate[d] a toxic overdose of succinylcholine":

> A: "I would say that the chemical findings are consistent with — now I use the term consistent with meaning that it is reasonable, that death *could have* occurred from succinylcholine." (Tr. 949). (Emphasis added).

On cross-examination Dr. Umberger candidly admitted that this was the first case on which he had worked with

a view toward demonstrating homicide by succinylcholine chloride. (Tr. 954). And, in response to a defense question, the doctor voluntarily emphasized that a shortage of time had hampered him in this case. (Tr. 955).[2] He testified that his tests were conducted on an embalmed brain, and that the fact of embalming had complicated the determinations. (Tr. 826). He acknowledged that every normal person has succinic acid and choline, the components of succinylcholine chloride, in his body at all times, that both are found in the normal brain, and, that though he had consulted the literature to determine normal levels, he was unsuccessful because the literature was "loused up" with discrepancies. (Tr. 963-64). He said that very little is known about the real chemistry of succinylcholine. (R. 1104). The doctor testified that his opinion as to a toxic dose of succinylcholine was not "positive." (Tr. 1108).

Dr. Umberger was recalled by the defense. He testified, that though his recovery experiments, whereby he obtained succinic acid,[3] had been done on Mrs. Coppolino's embalmed brain (Tr. 2247), he never attempted to learn whether or not injection of embalming fluid into the brain would account for the succinic acid. (Tr. 2267-69). The doctor said he didn't have enough time to do such tests. "I could work on this problem the rest of my life." (Tr. 2270).

The concluding portions of Dr. Umberger's testimony are most revealing as to the reliability and degree of certainty of his findings, and therefore, extremely critical to the petitioner's rights. The doctor was asked by defense counsel:

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[2] Q: "A shortage of time has hampered you in this case?"
A: "I would say that and put emphasis on it." (Tr. 955).

[3] Dr. Umberger based his findings on his analysis of this component of the drug. He conducted no experimentation for the choline component, believing that it could not be meaningfully analyzed. (R. 964-68).

Q: Is the work that you have done in this case in your judgment sufficiently certain as a method of determining the presence or absence of succinylcholine so that you would publish?

A: *I don't think it would be accepted for publication, no. It is not complete enough for publication.* (Tr. 2275). (Emphasis added).

. . . .

Q: Your statement is that the presence of succinic acid that you have isolated makes it *possible* that it came from an injection of succinylcholine chloride, right?

A: That is exactly right.

Q: *That is, in fact, as far as you can go?*

A: *That is as far as I went, as I recall. If I went further, I will retract it.* (Tr. 2277-8). (Emphasis added).

Upon these findings (R. 1305), juxtaposed with his negative findings as to the cause of death, Dr. Helpern gave his opinion that Mrs. Coppolino had died from an overdose of succinylcholine chloride (App. 22-23).

Petitioner produced eminent expert testimony which unequivocally refuted the findings and opinions of Drs. Umberger and Helpern. As the Court below stated in its opinion, the petitioner's "trial was a lengthy and involved one wherein medical and scientific witnesses were introduced by both sides. The witnesses presented a vast amount of complex and conflicting scientific testimony regarding the cause of death of Carmella Coppolino." (App. 21-22).

In addition, there was testimony as to the petitioner's dissatisfaction with his marriage, as to an intimate relationship with another woman (evidence of which was found to be error below, but harmless—see Reason III), receipt of life insurance payments upon the death of his wife, and the receipt, through normal channels, of a quantity of succinylcholine chloride from Squibb Laboratories in June of 1965.

The opinion of the court below is of great assistance to this Honorable Court in evaluating the essence of the procedural facts on consideration of this petition. The court rendered from an examination and consideration of all the evidence, the following:

> "It is clear from a reading of the transcript that the State's proof of corpus delicti depends almost solely upon the testimony of Drs. Helpern and Umberger and more specifically upon the tests performed by Umberger from which he concluded that the decedent received a toxic amount of succinylcholine chloride." (App. p. 23).

Reasons for Granting the Writ

I. THE DUE PROCESS REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT OF EVERY FACT NECESSARY TO CONSTITUTE MURDER IS VIOLATED, WHERE PROOF OF CORPUS DELECTI (PARTICULARLY AS TO CAUSE OF DEATH) DEPENDS SOLELY UPON EXPERT SCIENTIFIC TESTIMONY, WHICH CANNOT BE SAID TO REACH THAT STANDARD.

In the recent case of *In Re Winship* —— U.S. ——, 25 L.Ed. 2d 368, 374 this Court stated that, "expressions in many opinions of this court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required." The Court in clear terms affirmed:

> "Lest there remain doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute

the crime with which he is charged." Id. 25 L.Ed. 2d at 375

The Court below noted:

> "It is clear from a reading of the transcript that the State's proof of corpus delecti depends almost solely upon the testimony of Helpern and Umberger and more specifically upon the tests performed by Umberger from which he concluded that the decedent received a toxic amount of succinylcholine chloride." (App. p. 23).

Whatever the court below meant by corpus delicti,[4] it would be ludicrous to argue in this case that this conviction can be sustained without proof of cause of death.

Any fair reading of Dr. Umberger's testimony reveals that his conclusions are couched in terms of possibilities, not reasonable medical certainty—let alone is there any expression in his testimony of sufficient confidence to say that he held his opinions beyond a reasonable doubt. The most that can be gained from the evidence, strained to its maximum, is suspicion, surmise, speculation, and conjecture, that the cause of death might have been succinylcholine chloride.

Dr. Umberger recognized that his procedure was so *incomplete* and *unreliable* that he would not submit it by publication to the scrutiny of his profession, nor did he be-

[4] "The meaning of the phrase '*corpus delicti*' has been the subject of much loose judicial comment, and apparent sanction has been given to an unjustifiably broad meaning. It is clear that an analysis of every crime, with reference to this element of it, reveals three component parts, *first* the *occurrence* of the specific kind of injury or loss . . . ; *secondly*, *somebody's criminality* . . . as the source of the loss—these two together involving the commission of a crime by *somebody;* and *thirdly*, the *accused's* identity as the doer of this crime." 7 Wigmore, Evidence, § 2072 (3d ed. 1940). (Emphasis added).

lieve that it would be accepted for publication because of these deficiencies.

At the trial level the petitioner argued vehemently upon a motion for judgment of acquital that the evidence as to the cause of death could not permit a jury to find that cause beyond a reasonable doubt. (See argument and prosecutor's comments Appendix pp. 42-47).

On appeal he pressed his argument that proof of the cause of death was insufficient to comport with minimum standards of due process of law. The court ruled as follows:

> "We find that the question is not actually one of sufficiency or weight of the evidence for there was *ample evidence* before the jury to support its finding as to cause of death. Instead the question really involves the competency of the evidence." (App. p. 23). (Emphasis added).

The court then went on to observe that Drs. Umberger and Helpern held their "conclusion and opinions with reasonable medical certainty" (App. p. 24-25), and found that the petitioner had not shown an abuse of discretion on the admission of the new scientific tests. (App. p. 25). This facile statement of "reasonable medical certainty" is pure reliance of form over substance, even as regards the question of competency "answered" by the court.

Petitioner urges that the issue still is sufficiency of the evidence of cause of death. *In Re Winship, supra.*

> "In some cases the cause of death may be established without the use of expert testimony, especially where there is not an actual issue as to the cause of death or where there is no suggestion of death from any cause other than the wound inflicted, and de-

> ceased is shown to have been of previous good health and to have received proper medical treatment. If, however, *the cause of death is obscure and abstruse and a layman could have no well grounded opinion as to the cause, there is no proper foundation for a finding by the jury as to the cause without expert medical testimony.*" Homicide, 41 C.J.S. 312, p. 18. (Emphasis added).

How could the jury elevate Dr. Umberger's unreliable and uncertain findings and opinion to the level of beyond a reasonable doubt? Apparently, they don't have to in Florida. The court below held that "there was *ample evidence* before the jury to support its finding as to cause of death." (App. p. 23). (Emphasis added). The question as to whether corpus delicti must be established merely prima facie, by sufficiency of the evidence, or beyond a reasonable doubt, appears to be in a quandry in this nation.[5] See, Veldorale, *The Principle of Corpus Delicti and the Evidence Pertaining Thereto,* 39 Temp. L.Q. 1 (1965). However, the court's meaning in the instant case as to "ample evidence", is not in question in light of Florida's requirement of only the minimal standard of prima facie evidence.

> "[T]he corpus delicti need not be established beyond and to the exclusion of a reasonable doubt, but only prima facie." *Skuler* v. *State,* 132 So. 2d 78.

Furthermore, it is incumbent upon Florida appellate courts in criminal matters to determine only whether there was "substantial competent evidence to convict." *Wincor* v. *Florida,* 212 So. 2d 42. It appears settled in Florida, that

[5] This case offers an appropriate opportunity to resolve that conflict.

the contention that the evidence was not sufficient to establish beyond a reasonable doubt a defendant's guilt is an issue which can be decided only by the trial jury, and that the sole authority of the appellate court is to review the record for the purpose of determining whether it contains sufficient, competent, substantial evidence, which, if believed, would support the verdict. *Lee* v. *State,* 153 So. 2d 351, cert. denied 37 U.S. 999.[6] The Florida appellate courts do not entertain the question of reasonable doubt. *Little* v. *State,* 192 So. 2d 793, (quashed 206 So. 2d 9, on other grounds).

Such a determination of corpus delicti at the trial level, and such inquiry upon appeal as to the sufficiency of the guilt of a criminal defendant, are obnoxious to due process. Since the requirement of proof beyond a reasonable doubt is a federal question, not only must the proof be sufficient, but the inquiry on appeal must address itself to that requirement. Florida has failed both in the proof, *Re Winship, supra,* and in the appellate inquiry, *Chapman* v. *California,* 386 U.S. 18.

Petitioner respectfully submits, that though it appears clear that Florida has applied an improper standard of review, this case need not be remanded for consideration consistent with federal standards. This Court has found it necessary and proper in the protection of significant federal constitutional rights, to make an independent determination from the record, e.g. voluntariness of confession, *Clewis* v. *Texas,* 386 U.S. 707; probable cause for arrest and search and seizure, *Henry* v. *United States,*

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[6] Contra, e.g. *Hopkins* v. *United States,* 275 F.2d 155 (CA-DC), conviction must be reversed where it is clear that upon the evidence a reasonable mind must have a reasonable doubt as to guilt; *Nagell* v. *United States,* 393 F.2d 934 (CA-5), credibility and weight of expert opinion are for trier of fact, but reviewing courts must reverse where clear reasonable doubt.

361 U.S. 98; *Beck* v. *Ohio*, 379 U.S. 89; fairness of line-ups, *Stoval* v. *Denno*, 388 U.S. 293; voluntariness and intelligent waiver of constitutional rights, *Johnson* v. *Zerbst*, 304 U.S. 458. In *Winship, supra,* this Court displayed that the constitutional requirement of proof beyond a reasonable doubt is one of the very underpinnings of our criminal justice. Certainly, it is equally as important as the aforementioned rights. Appellant submits, that it is so clear upon the record in this matter, that proof beyond a reasonable doubt as to the cause of death is lacking, that this case is a proper vehicle for such a determination and that his conviction ought be reversed.

II. THE DUE PROCESS REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT OF EVERY FACT NECESSARY TO CONSTITUTE THE CRIME IS VIOLATED, WHERE, UPON A TRIAL OF AN ANESTHESIOLOGIST FOR FIRST DEGREE MURDER BY THE PREMEDITATED AND KNOWING INJECTION OF A FATAL DOSE OF A PARALYZING COMPOUND, THE APPLICATION OF A STATE STATUTE PERMITS A CONVICTION OF SECOND DEGREE MURDER, THOUGH THERE BE NO EVIDENCE OF THE CRIME OF SECOND DEGREE MURDER?

If waiting until ones wife is vulnerable, taking out a poison, loading it into a syringe, injecting into ones wife, and then waiting minutes while she dies of suffocation because of failure of her diaphram is not premeditated first degree murder, then it would seem that no act is premeditated first degree murder. Nonetheless, the jury returned a verdict of second degree murder!

Petitioner argued below that the State's theory and alleged evidence of murder was either first degree murder or nothing, and that it was prejudicial and constitutional error to instruct the jury on second degree, third degree and manslaughter.[7] The Petitioner argued that because the State's evidence of cause of death was insufficient, such

[7] See Appendix p. 48 for State homicide statutes.

instruction would, and did, permit an unsure jury to compromise its verdict.

Florida Statute § 919.14 provides:

> "Determination of degree of offense — If the indictment or information charges an offense which is divided into degrees, without specifying the degree, the jurors may find the defendant guilty of any degree of the offense charged; if the indictment or information charges a particular degree the jurors may find the defendant guilty of the degree charged or of any lesser degree. The court shall in all such cases charge the jury as to the degrees of the offense."

The Supreme Court of Florida has interpreted this statute thusly:

> "If the evidence is sufficient to support a verdict of guilty of the offense charged, the jury has the power under § 919.14 to find the accused guilty of a lesser degree of the offense *regardless of the lack of evidence as to such degree.*" *Brown* v. *State,* 206 So. 2d 377. (Emphasis added).

Upon the strength of the statute, and upon the interpretation in *Brown, supra,* the court below denied the petitioner's contention that his conviction of second degree murder was a compromise and violated both state and federal constitutional law. (App. p. 27). In *Green* v. *United States,* 218 F. 2d 856,[8] an accused had been found guilty of arson and second degree murder. The court held that the conviction of second degree murder was not supported by the evidence. The evidence (that the victim died

[8] Retrial and conviction on first degree murder led to this Court's decision in *Green* v. *United States*, 355 U.S. 184.

from inhaling flames set by the accused in the act of arson) admitted of the conclusion that the petitioner was guilty of first degree murder, or not at all, and thus the trial judge's instruction to the jury on second degree murder was reversible error.

The danger of a compromise verdict where a questionable fact pattern admits of a necessarily included crime is real enough (that may be an issue for another day); but, where as here, a state statute permits conviction of a lower degree of crime than charged, though there be *no evidence* of the lower degree, it is a rank invitation to compromise in difficult cases, and should not be tolerated under our system of due process of law.

The apparent safeguard in permitting the operation of the Florida statute is the provision that there be sufficient evidence[9] as to the higher degree. However this provision is pure sophistry—an illusion. How can the evidence be sufficient on the higher degree, if the jury did not return a verdict on that degree. As this Court said in *Green* v. *United States,* 355 U.S. 184, a conviction of a lesser degree of crime is an implicit acquittal of the higher degree. It is academic to go behind the acquittal to ask if there was "sufficient evidence" to convict, regardless of the standard of sufficient evidence. The jury says that there was not.[10]

Furthermore, even assuming for argument, that this fatal flaw in logic and law can be somehow rationalized, the petitioner does not complain of the salutary possibility that though a jury could convict as to a higher degree it mitigate to the lower degree. Rather, the petitioner urges, as in his case, that the Florida practice invites and permits a compromise. And, in the final analysis, though mercy is much to be desired in the administration of criminal justice, the

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[9] The petition argued in Reason I that Florida's standard of "sufficient evidence" is constitutionally defective. If that be so, the statute must fail for that reason also.

[10] It may be argued that the jury did not convict for some other reason. However, that is speculation. "[I]t is impossible to know from the jury's verdict. . . ." *Robinson* v. *California,* 370 U.S. 660, 665.

potential danger under such a practice as this is too great a risk. It is a far safer and appropriate practice that those who are legitimately guilty of a higher degree be held to that degree, than it be said that our law permits conviction of a crime for which there is *no* evidence.[11]

The Constitution simply does not permit a conviction for which there is no evidence. The State's alleged proof necessarily excludes second degree murder. Because Florida Statute § 919.14 permits such a conviction, there is no possible assurance that that is not what the jury did. Indeed, this Court must assume that it did. *Robinson* v. *California*, 370 U.S. 660. The conviction and the statute are unconstitutional. *In Re Winship, supra; Thompson* v. *Louisville*, 362 U.S. 199.

III. The State of Florida Committed Federal Constitutional Error in Applying Its State Standard of Harmless Error in Finding That Testimony of Prior Crimes of Adultery, and of a Statement of the Petitioner's Stepdaughter, Given in Rebuttal by a Third Person, That: "I Wouldn't Be Surprised if He Killed His First Wife" Was Harmless Error.

The Court below noted that one, Marjorie Farber, was permitted, over repeated defense objections, to testify concerning crimes committed by her and the petitioner. She testified, "that: between Spring 1962 and January 1964 she and the defendant were 'lovers,' during this time defendant was married to the decedent, and pursuant to their 'affair' she and defendant made several trips together including trips to Florida." (App. p. 27).

In addition, the opinion notes, that the State on cross-examination of the petitioner's stepdaughter, Heidi Gibson, asked "whether she had stated in the presence of Millie Smith that she thought defendant had killed his first wife, Carmella." (App. p. 32). She denied the statement. Later the State introduced Millie Smith as a witness and

[11] If a state desires mitigation, it has other means of eliciting mercy from a jury.

asked if Heidi Gibson had ever expressed the belief, in her presence, that defendant killed the decedent. Smith replied that Heidi Gibson had stated "I wouldn't be surprised if he killed his first wife." (App. p. 32).

The court found error as to both the prior-crimes-evidence, and the question and rebuttal of the petitioner's stepdaughter. As to the former, the evidence of the prior crimes of adultery, the court said:

> "We believe that the testimony in question was irrelevant to the proper issues of the case, that its sole effect was to attack the character of the accused and that the trial court erred by admitting it into evidence. (App. p. 28).

As to the latter, the court said:

> "It was improper for the State to ask Heidi Gibson whether she had ever expressed an opinion as to the defendant's guilt.... Also, the State's attempt by use of rebuttal witness, Millie Smith, to show that Heidi Gibson had expressed an opinion as to the defendant's guilt was improper." (App. p. 32).

However, the court noted, that as to the former, the trial judge had given a limiting instruction, (App. 31), and as to the latter, the trial judge instructed the jury to disregard the testimony of Millie Smith,[12] though it left standing the question put by the prosecutor to the petitioner's stepdaughter. The petitioner maintains that the limiting instruction and the striking of the rebuttal testimony did not cure the prejudice done him. *Bruton* v. *United States*, 391 U.S. 123.

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[12] Having been denied his motion for mistrial (R. 2359), counsel for petitioner requested the instruction, but specifically without waiver of his motion for mistrial.

It has been observed in this Court that decisions of this Court, of the Courts of Appeal, and of state courts "suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause." *Spencer* v. *Texas*, 385 U.S. 554, 574, (Warren, C.J. and Fortas, J. dissenting). And, as at least one Court of Appeals has noted, the "opinions or expressions of witnesses as to an accused's guilt are of course irrelevant and incompetent as considerations for conviction. ... [S]uch opinions or expressions, more than other forms of collateral inquiry ... can have a subtle and sensitive influence on the ultimate problem confronting the jury." *Arpan* v. *United States*, 260 F.2d 649, 659 (CA-8).

Petitioner submits, that in the context of this case, which fails so drastically in establishing corpus delicti, these acknowledged errors, separately and in conjunction, were at once so inflammatory and improper to the consideration of his guilt, that he was denied due process of law.

Florida Statute § 924.33 provides:

> "When judgment not to be reversed or modified. — No judgment shall be reversed unless the appellate court after an examination of all the appeal papers is of the opinion that error was committed which injuriously affected the *substantial rights* of the appellant. It shall not be presumed that error injuriously affected the *substantial rights* of the appellant." (Emphasis added).

The court below in applying the statute and the opinions of the Florida courts interpreting the statute, concluded as to each of the above errors, in consideration of the case and of the instructions given by the trial court:

> "[T]here is no *reasonable probability* that the verdict

would have been different had the improper evidence been excluded." (App. p. 31). (Emphasis added).

Clearly the statute's reference to "substantial rights", as in the statute in *Chapman* v. *California*, 386 U.S. 18, and the application of the statute by the court, do not reach the federal standard required—that the appellate court be able to state a "belief beyond a *reasonable doubt* that the error complained of did not contribute to the verdict obtained." *Id*, at 24. (Emphasis added). Nor, was the proof of the petitioner's guilt overwhelming. *Harrington* v. *California*, 395 U.S. 250.

Conclusion

For the several reasons set forth above, petitioners urgently pray that a writ of certiorari issue from this Court to review the judgment of the District Court of Florida, Second District.

Respectfully submitted,

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Attorneys for Petitioner

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APPENDIX A

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT
JULY TERM, A.D. 1968

Case No. 67-193

CARL A. COPPOLINO,
APPELLANT,
v.
STATE OF FLORIDA
APPELLEE.

Opinion filed November 8, 1968.
Appeal from the Circuit Court for Collier County;
LYNN N. SILVERTOOTH, Judge.
F. LEE BAILEY, Boston, Mass., JAMES M. MCEWEN, Tampa, and JAMES RUSS, Orlando, for Appellant.
EARL FAIRCLOTH, Attorney General; GEORGE R. GEORGIEFF, Assistant Attorney General, Tallahassee; FRANK SCHAUB, State Attorney, and WILLIAM STRODE, Assistant State Attorney, Bradenton, for Appellee.
LILES, Chief Judge.

The defendant, Carl Coppolino, was tried upon an indicement charging him with the first degree murder of his wife Carmella. The jury found defendant guilty of murder in the second degree and pursuant to this verdict judgment and sentence was entered. From this judgment and sentence defendant appeals.

Defendant's trial was a lengthy and involved one wherein medical and scientific witnesses were introduced by both sides. The witnesses presented a vast amount of complex and conflicting scientific testimony regarding the cause

of death of Carmella Coppolino. The defendant in his second point on appeal states in reference to the scientific testimony presented by the State, "the verdict is not supported by sufficient evidence and is against the weight of the evidence."

At trial the State introduced a Dr. Helpern, a pathologist who serves as chief medical examiner for the City of New York, and a Dr. Umberger, a toxicologist who is in Dr. Helpern's office. Dr. Helpern testified that: he performed an autopsy on the exhumed body of Carmella Coppolino and as a result of his findings concluded that she was in good health at the time of death, at the conclusion of his autopsy he was not able to determine the cause of death, he found a needle injection tract in the left buttock of the deceased, following his autopsy he turned over certain portions of Carmello Coppolino's body tissue to Dr. Umberger so that Umberger could perform chemical analyses and tests on that tissue. Dr. Umberger testified that he first performed a "general unknown" test which was designed to disclose the presence of certain drugs and poisons in the body tissue. The results of this "general unknown" test were negative. Dr. Umberger then attempted to establish a method whereby he could determine if unusual amounts of the component parts of succinylcholine chloride were present in the body tissue. Dr. Umberger testified that some of his tests and procedures were standard ones and that some were new. As a result of his tests Dr. Umberger reached the conclusion, and so testified, that Carmella Coppolino received a toxic dose of succinylcholine chloride.

Dr. Helpern was then recalled and asked his opinion as to the cause of death. He stated that based upon his negative findings from the autopsy and upon Dr. Umberger's positive findings concerning the component parts

of the drug, succinylcholine chloride, he concluded that the decedent died from an overdose of said drug.

A Dr. La Du was called by the State and he testified that he found a minute quantity of substance at the needle injection site which was consistent with the component parts of succinylcholine chloride. Also, a Dr. Cleveland was called and he, in response to a hypothetical question, stated that based upon the negative findings of Dr. Helpern and the positive findings of Dr. Umberger he was of the opinion that death resulted from a toxic dose of succinylcholine chloride.

It is clear from a reading of the transcript that the State's proof of the corpus delicti depends almost solely upon the testimony of Helpern and Umberger and more specifically upon the tests performed by Umberger from which he concluded that the decedent received a toxic amount of succinylcholine chloride. We find that the question is not actually one of sufficiency or weight of the evidence for there was ample evidence before the jury to support its finding as to cause of death. Instead, the question really involves the competency of the evidence. That is, should the trial judge have allowed into evidence testimony concerning Dr. Umberger's tests. Actually, the defendant does contest the competency of the testimony concerning Dr. Umberger's tests even though he does not specifically mention it in his point on appeal.

Several witnesses, including those called by the State, testified that prior to the performance of the tests in question it was believed impossible by medical scientists to demonstrate the presence of succinylcholine chloride or its component parts in the body. However, Dr. Umberger, using various procedures, concluded that it was possible to detect succinic acid, a component of succinylcholine chloride, in the body tissue and he testified that he found this acid in abnormal amounts.

The general rule regarding admission of scientific evidence is:

> "Where the evidence is based solely upon scientific tests and experiments, it is essential that the reliability of the tests and results thereof shall be recognized and accepted by scientists or that the demonstration shall have passed from the stage of experimentation and uncertainty to that of reasonable demonstrability. . . ." 2 Jones on Evidence §457 (5th ed. 1958). See also 31 Am. Jur. 2d Expert and Opinion evidence §44; Notes, Admissibility of Evidence Obtained by Scientific Devices and Analyses, 5 U. Fla. L. Rev. 5 (1952).

Florida has apparently adopted this rule. See *Kaminski* v. *State,* Fla. 1953, 63 So.2d 339, wherein the court in excluding evidence of the giving of a lie detector test quoted from *Frye* v. *United States,* 293 F. 1013, 1014 (D.C. Cir. 1923), saying at page 340:

> " 'We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made.' "

However, it is also a rule in Florida that the trial judge enjoys wide discretion in areas concerning the admission of evidence and that his ruling on admissibility of evidence will not be disturbed unless an abuse of discretion is shown. *Mutual Life Ins. Co. of New York* v. *Bell et al,* Fla. 1941, 3 So.2d 487.

The problem presented to the trial judge was: Were the scientific tests performed by Umberger so unreliable and scientifically unacceptable that their admission into evidence was error?

Drs. Umberger, Helpern and Cleveland stated that they

held their conclusions and opinions with reasonable medical certainty. The defendant produced scientific witnesses who challenged the conclusions of the State's witnesses and the methods and tests used to reach those conclusions. In this case, unlike those involving lie detector tests or intoxication tests, there is a dearth of literature and specific case law to guide the trial and appellate courts. The trial court listened to the testimony of the expert witnesses and in an exercise of his discretion ruled that the tests in question were sufficiently reliable to justify their admission.

On appeal it is incumbent for defendant to show that the trial judge abused his discretion. This the defendant has failed to do.

The trial court in instructing the jury gave instructions on all degrees of murder and man-slaughter. Defendant in his fifth point on appeal contends that the trial judge committed reversible error by instructing the jury on second degree murder, third degree murder and man-slaughter. Defendant argues that it is logically impossible for someone to commit second degree murder by the deliberate use of drugs or poisons and that the instructions invited a compromise verdict.

Florida Statute §919.14 provides:

> "Determination of degree of offense. . . . If the indictment or information charges an offense which is divided into degrees, without specifying the degree, the jurors may find the defendant guilty of any degree of the offense charged; if the indictment or information charges a particular degree the jurors may find the defendant guilty of the degree charged or of any lesser degree. The court shall in all such cases charge the jury as to the degrees of the offense."

In the recent case of *Brown* v. *State*, Fla. 1968, 206

So.2d 377, the Florida Supreme Court had occasion to discuss this statute. The court said at page 381:

> "(1) CRIMES DIVISIBLE INTO DEGREES. Section 919.14, applies only to those crimes which are divided into degrees, e.g., unlawful homicide (Fla. Stat. §§ 782. 04, 782.06, F.S.A.), and arson (Fla. Stat. §§ 806.01-806.04 F.S.A) If an accused is charged with the highest degree of such a crime, the court should charge the jury on all lesser degrees In this category it is immaterial whether the indictment specifically charges the lesser degrees or whether there is any evidence of a crime of such degree. *Killen* v. *State,* 92 So.2d 825 (Fla. 1957; *Brown* v. *State,* 124 So.2d 481 (Fla. 1960). The court must instruct on the lesser degrees simply because §919.14 clearly requires it, and not because such degrees are necessarily included lesser offenses. In many cases the elements of the lesser degrees are totally distinct from the offense charged. See e.q., *Clemmons* v. *State,* 43 Fla. 200, 30 So. 699 (1901). If the evidence is sufficient to support a verdict of guilty of the offense charged, the jury has the power, under §919.14 to find the accused guilty of a lesser degree of the offense regardless of the lack of evidence as to such degree. *Killen* v. *State,* supra; *Hodella* v. *State,* 158 Fla. 94, 27 So.2d 674 (1946). Under the statute, the trial judge should, and if requested must, instruct on all lesser degrees of the offense, if the case is allowed to go to the jury for a determination of guilt or innocence on the offense charged. *Brown* v. *State,* 124 So.2d 481 (Fla. 1960)."

At page 382 the court added:

> "Here is a difference between §919.16—the necessarily included offense statute—and §919.14—the divisibility into degrees statute. Under the former the lesser

> offense must *necessarily* be included in the offense charged. Hence, it is necessary to prove the lesser in order to prove the greater. Under §919.14, the lesser degrees of the major crime are not necessarily included in it, and, therefore, are not essential elements of proof in establishing it. Nevertheless, the statute, §919.14, permits a jury to convict of the lesser degree regardless of the accusation and proofs."

In light of §919.14 and Brown it is clear that the trial judge did not err by giving the instructions in question.

In his sixth point on appeal, defendant asserts that the trial judge erred by admitting into evidence certain testimony given by one Marjorie Farber concerning crimes committed by her and defendant. This witness who was called by the State testified, over repeated defense objections, that: between Spring 1962 and January 1964 she and defendant were "lovers," during this time defendant was married to the decedent, and pursuant to their "affair" she and defendant made several trips together including trips to Florida. The witness then testified that the defendant made certain allegedly incriminating statements concerning the death of his wife in her presence.

Clearly, the activities testified to by the witness constituted criminal acts. See Florida Statute 798.03 which pertains to fornication.

In *Williams* v. *State,* Fla. 1959, 110 So.2d 654, 663, the court clarified the rule concerning admission of evidence of other crimes. The court in pointing out that the primary question was one of relevancy of the evidence sought to be introduced stated:

> "Evidence of any facts relevant to a material fact in issue except where the sole relevancy is character or propensity of the accused is admissible unless precluded by some specific exception or rule of exclusion. . . ."

Generally, evidence of another crime is considered relevant and therefore admissible if it shows motive, criminal intent, guilty knowledge, absence of mistake, common scheme, identity, pattern of criminality or if it tends to foreclose a defense otherwise open to the accused. *Williams* v. *State,* Fla. 1962, 143 So.2d 484; *Suarez* v. *State,* Fla. 1928, 115 So. 519. The testimony in question des not fall within any of the above mentioned categories. However, the State claims that the testimony in dispute was introduced in order to establish the intimate relationship between the witness and defendant so that the jury would believe that the defendant did confide in her and make damaging statements in her presence.

We have found no authority, nor have we been referred to any by the State, supporting the proposition that the State can introduce testimony of unrelated crimes in an attempt to strengthen the credibility of the witness. However through independent research, we have become familiar with the case of *Rhodes* v. *State,* Fla. 1932, 140 So. 309. In Rhodes a character witness was testifying on behalf of the defendant. The State, in an attempt to show that the character witness was interested in the welfare of the defendant and thereby impeach said witness, introduced testimony of a prior unrelated crime for which the defendant was charged. The Florida Supreme Court held that such testimony was improper and should have been stricken. Certainly, if evidence of unrelated crimes is inadmissible to attack the credibility of a witness it is also inadmissible to buttress the credibility of a witness.

We believe that the testimony in question was irrelevant to the proper issues of the case, that its sole effect was to attack the character of the accused and that the trial court erred by admitting it into evidence. However, the fact that an error was committed in admitting the testimony does not automatically result in reversal, there must be a show-

ing that such error was harmfully prejudical to the defendant.

> "The improper admission of proof of other crimes does not always constitute reversible error and convictions may be sustained when the nature of the other crimes is so minor that it is unlikely that the defendant was prejudiced, or the evidence of guilt so strong that it is improbable that a contrary result would be reached." 1 Wharton's Criminal Evidence, Section 233 (Supp. 1968).

Florida Statute §924.33 provides:

> "When judgment not to be reversed or modified.—No judgment shall be reversed unless the appellate court after an examination of all the appeal papers is of the opinion that error was committed which injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant."

In *Coggins* v. *State,* Fla. App. 1958, 101 So.2d 400, the defendant was charged with first degree murder. He appeared at trial in a Marine uniform bearing the chevron of a corporal. The State introduced testimony of defendant's bad conduct while in the service, ostensibly for the purpose of showing that prior to the commission of the homicide defendant had been reduced to the rank of private. The appellate court held that although error was committed it was not harmful. See *Rhodes* v. *State, supra.*

The defendant in *Jordan* v. *State,* Fla. 1932, 144 So. 669, was charged with breaking and entering. The State in cross-examining the defendant questioned him about previous arrests and a previous conviction, even though the accused had not placed his character in issue. The court held that although error was committed by the admission of these questions, in light of the entire record, reversal was not justified.

In *Cornelius* v. *State,* Fla. 1950, 49 So.2d 332, the defendant, who was charged with first degree murder, had placed his reputation as being a peaceful and law-abiding citizen in issue. The State introduced rebuttal evidence of specific acts of violence and turbulence on the part of defendant. At page 335 the court stated that defendant's contention of error "appears to be well taken but it does not follow that the error was harmful or prejudical." The court further said:

> "In determining whether the error of which complaint is made was harmful or prejudicial, we must decide upon examination of all the evidence whether the result would have been different had the improper evidence been excluded. The evidence in this case 'leaves no room for reasonable doubt of the defendant's guilt' of manslaughter and the admission of the rebuttal testimony with which the appellant finds fault did not constitute harmful or prejudicial error. We find from the evidence that the appellant received a fair and impartial trial and conclude from the jury's verdict of guilty of manslaughter, *when it reasonably could have found a verdict of guilty of a higher degree of homicide,* that the jury was not in fact prejudiced against the appellant."

In this case the jury could have reasonably found defendant guilty of murder in the first degree.

In deciding whether the testimony complained of was prejudical it must be considered in light of the entire transcript of testimony. Mrs. Farber's testimony comprised a very minor portion of the trial. That portion of her testimony which is in dispute occupies roughly six pages of a transcript of testimony totaling 1842 pages. It does not appear that undue time was spent on her testimony nor does it appear that undue emphasis was placed on it before the jury.

The trial judge in instructing the jury stated:

> "The court admitted testimony by a witness that she and the defendant had been lovers and had been intimate. If you find this evidence creditable (sic) you must not consider it in any way as impuning (sic) the character of the defendant or as indicating that he is the type of person who is likely to commit a crime."

This instruction tended to mitigate any prejudice that resulted from the erroneous admission of Mrs. Farber's testimony.

In *Boyett* v. *State,* Fla. 1928, 116 So. 476, the court pointed out one of the dangers of admitting evidence of similar crimes. The court stated at page 476:

> "Evidence that a defendant has committed a similar crime, or one equally grave, has a tendency to promote a more ready belief by the jury that he might have committed the one with which he is charged, thereby predisposing the mind of the juror to believe the prisoner guilty."

The crime of fornication is neither similar to the crime of murder nor equally heinous nor is it a crime of violence. It is highly improbable that testimony concerning defendant's commission of this relatively minor crime would cause the jury to infer that defendant was likely to commit murder.

Upon considering the nature of the crime to which the testimony in question was given in conjunction with the entire record we believe there is no reasonable probability that the verdict would have been different had the improper evidence been excluded. Therefore upon consideration of the above discussed case law, and Florida Statute §924.33, we find that although it was error to admit the testimony in question, this error was not harmfully prejudical to defendant and did not deny him a fair trial.

The defendant in his seventh point on appeal complains of certain questions asked by the State of witnesses Heidi

Gibson and Millie Smith. The State on cross-examination asked Heidi Gibson, now defendant's stepdaughter, whether she had stated in the presence of Millie Smith that she thought defendant had killed his first wife, Carmella. Heidi Gibson testified that she had not made such a statement.

Later the State introduced Millie Smith as a witness and asked if Heidi Gibson had ever expressed the belief, in her presence, that defendant had killed the decedent. Smith replied that Heidi Gibson had stated "I wouldn't be surprised if he killed his first wife." However, acting upon defendant's objections the trial judge instructed the jury to disregard the testimony of Millie Smith.

It was improper for the State to ask Heidi Gibson whether she had ever expressed an opinion as to defendant's guilt. *Blackwell* v. *State,* Fla. 1918, 79 So. 731; *Gibbs* v. *State,* Fla. App. 1967, 193 So.2d 460. Also, the State's attempt by use of a rebuttal witness, Millie Smith, to show that Heidi Gibson had expressed an opinion as to defendant's guilt was improper. *Myers* v. *State,* Fla. 1901, 31 So. 275.

However, as stated above, witness Smith's testimony was stricken leaving before the jury only the statement by Heidi Gibson that she had not expressed an opinion as to defendant's guilt. Thus, it appears that the questions complained of were not harmful to defendant and are not grounds for reversal.

The defendant's other five points on appeal have been carefully considered and found to be without merit.

It appears to this court that the defendant received a fair trial free from prejudical error, therefore the judgment is affirmed.

HOBSON, J., CONCURS.

MANN, J., CONCURS SPECIALLY.

MANN, JUDGE, CONCURRING SPECIALLY.

I have arrived at my Brother Liles' conclusion by a different route.

Carmella Coppolino was alive and well on August 28, 1965. The next morning she was dead, of no natural cause discoverable upon autopsy of her exhumed body four months later. A general toxicological investigation disclosed no possible cause of death. A puncture wound in the left buttock like that which a needle would make, and the track of a needle disclosed by examination of the subcutaneous fat, suggested death by something injected into her body.

Carl Coppolino was an anesthesiologist and had used succinycholine chloride. It is a muscle relaxant which, in the absence of artificial respiration, will cause a cessation of breathing. There was evidence that it was thought by many and said by Coppolino to have been undetectable in the body after death, and that Coppolino had bought a quantity of it in June. The state attorney postulated that this right-handed woman had not committed suicide, but had died as a result of the injection by the defendant of this drug.

The tests by which the medical examiner sought to determine whether death was caused by succinylcholine chloride were novel and devised specifically for this case. This does not render the evidence inadmissible. Society need not tolerate homicide until there develops a body of medical literature about some particular lethal agent. The expert witnesses were examined and cross-examined at great length and the jury could either believe or doubt the prosecution's testimony as it chose.

After a three-week trial Coppolino was convicted of murder in the second degree. He rests his argument that the judgment and life sentence entered upon this verdict cannot be upheld upon an especially seductive syllogism: Murder in the second degree is murder without premeditation. Murder by injection of succinylcholine chloride is of necessity done with premeditation. Therefore Coppolino

cannot be guilty of murder in the second degree. It is the arrival at sound conclusions from false or irrelevant premises which has given formal logic a bad name among sensible people. This argument might well persuade a jury that the offense was more serious than they found it to be, which might explain its being made to us rather than to the jury. But we do not review the facts. We review the legal basis for findings of fact. This difference in role between an appellate court and a jury underlines the speciousness of the argument. In the game of shuffleboard, a puck thrust with sufficient force to take it beyond a line separating a quadrangle marked "7" from one marked "8" counts for eight points. Thrust with sufficiently less force to stop it short of the line, it counts for seven. Thrust with such intermediate force as to cause it to touch the line, however slightly, it counts for nothing. The appellant would persuade us that murder is the same sort of a game.

The court was obligated by statute, Fla. Stats. §919.14, to charge the jury on all degrees of murder and manslaughter. See *Brown* v. *State*, 206 So.2d 377 (Fla. 1968). If the jury had any reasonable doubt as to premeditation, they were at liberty to find Coppolino guilty of murder in the second degree and under oath *not* to convict him of murder in the first degree, which demands a finding of all the elements beyond that reasonable doubt. He cannot complain here of being convicted of a lesser degree of murden than the evidence would support. *Ammons* v. *State*, 88 Fla. 444, 102 So. 642 (1924); *Brown* v. *State*, 31 Fla. 207, 12 So. 640 (1893); *Jimenez* v. *State*, 30 So.2d 292 (Fla. 1947).

I differ with Chief Judge Liles on the admissibility of Marge Farber's testimony. It is, in my view, clearly admissible to prove motive. Much of the testimony in this trial pieced together the story, not that Carl Coppolino had any particular hostility toward Carmella, but that she had no further utility to him. Her father had helped them

financially but was now retired. She anticipated an income from the practice of medicine until she failed the basic science examination required of all practitioners of the healing arts for licensure in Florida. His tangled emotional state was attested by the Farber affair, his staying for several nights in a motel room a mile or so from his home to think through his marriage, his romance with Mary Gibson, whom he married six weeks after Carmella's death and who has stood by him through all these subsequent troubles. There was evidence that a claimed cardiac condition on account of which he drew disability income in excess of twenty thousand dollars a year could not be confirmed by Sarasota physicians and was under investigation by the insurance company.

The admissibility of relevant evidence is largely discretionary with the trial court, and over the years the increasing intelligence of jurors has broadened the scope of admissibility, particularly with reference to evidence admissible for one purpose but inadmissible for another. See Goodhart, A Changing Approach to the Law of Evidence, 51 Va. L. Rev. 759 (1965). The trial judge here, whose conduct of the trial was admirable, in general, could have made it plainer at the time of reception of the evidence that it was admitted not to show bad character but a possible motive for the crime, but later made this point clear to the jury. As Lord Goddard said in *Rex* v. *Kritz*, L.K.B. 82, at 89 "Juries are not such fools as they are very often thought to be."

I cannot believe that evidence of an affair with Mrs. Farber, which involves the crime of fornication, is more shocking to the jury than evidence that the defendant and Mary Gibson, wearing matching Bermuda shorts, happily played bridge at Mrs. Maxwell's studio. I deem it unnecessary for the legislature to repeal the statute proscribing fornication in order to make evidence of an extra-marital

affair admissible to show a motive for uxoricide. The case law supports admissibility. I accept the case cited by appellant as grounds for reversal as authority for the correctness of the trial judge's action here. In *Commonwealth* v. *Burke,* 339 Mass. 521, 159 N.E. 2d 856 (1959), evidence of an affair terminated seven months before the wife's murder was held inadmissible *because remote.* In that case Mr. Justice Spalding said (id., at p. 864):

> "Evidence that one accused of killing his wife has formed an attachment for another woman may form the basis of an inference that the accused entertained feelings of hostility toward his wife. *Commonwealth* v. *Bonomi,* 335 Mass. 327, 355, 140 N.E. 2d 140 . . .
>
> * * * *
>
> "The trial judge, of course, must be accorded a broad area of discretion in passing upon the admissibility of evidence of this type. We think, however, that the evidence here, unconnected with latter events of like nature, was too remote. In cases where such evidence has been held admissible it will appear that the relationship shown was less remote in time. See *Commonwealth* v. *Howard,* 205 Mass. 128, 91 N.E. 397 (relationship continued to the time of wife's death); *Commonwealth* v. *Mercier,* 257 Mass. 353, 153 N.E. 834 (relationship continued until about three weeks before wife's death); *Commonwealth* v. *Bonomi,* 335 Mass. 327, 140 N.E. 2d 140 (relationship continued until day wife disappeared). See also *Commonwealth* v. *Abbott,* 130 Mass. 472. We intend no suggestion that proof of hostility between the defendant and his wife in February and March would not have been competent. On the contrary, we think it would have been."

Relevance is the critical test. See *Williams* v. *State,* 110 So.2d 654 (Fla. 1959).

There is evidence that Mrs. Farber saw Coppolino on

August 28th and again on the 29th, that she offered to — even wanted to — keep the Coppolino children and that she would like to have been the next Mrs. Coppolino. There is no remoteness here which would exclude this evidence, accompanied as it was by proper admonition.

I concur in Chief Judge Liles' opinion that the other issues, no more substantial than the objections to the State's peremptory challenge of a juror who happened to be a chemist, do not warrant extended discussion, and in the judgment of affirmance.

Appendix B

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1969
TUESDAY, DECEMBER 9, 1969

Case No. 38,868

CARL A. COPPOLINO,
APPELLANT,
v.
STATE OF FLORIDA,
APPELLEE.

Upon consideration of motion to dismiss filed by appellee, said motion is granted and it is ordered that the appeal be and the same is hereby dismissed.

A True Copy

TEST:

(s) SID J. WHITE
SID J. WHITE
Clerk Supreme Court.

cc: Honorable Joseph E. Gillen
Honorable Margaret T. Scott
Honorable Lynn N. Silvertooth
Honorable George R. Georgieff
Honorable F. Lee Bailey
Honorable James M. Russ

Appendix C

IN THE CIRCUIT COURT OF THE TWELFTH
JUDICIAL COURT OF THE STATE OF FLORIDA,
IN AND FOR SARASOTA COUNTY, FLORIDA
THE 25TH DAY OF JULY, 1966 ASSIGNED TO JUDGE LYNN N. SILVERTOOTH
2389
MURDER IN THE FIRST DEGREE

STATE OF FLORIDA
v.
CARL COPPOLINO

INDICTMENT

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

The Grand Jurors of the County of Sarasota charge that Carl Coppolino of the 28th day of August, 1965, in the County of Sarasota, State of Florida, did unlawfully and from a premediated design to effect the death of Carmella Coppolino, make an assault on the said Carmella Coppolino, and in some way and manner and by some means, instruments and weapons to the grand jurors unknown, he, the said Carl Coppolino did then and there, unlawfully and from a premeditated design to effect the death of the said Carmella Coppolino, inflict on and create in the said Carmella Coppolino certain mortal injuries and a mortal sickness, a further description whereof is to the grand jurors unknown, the said Carmella Coppolino then and there died and so the said Carl Coppolino did, in the manner and form aforesaid, unlawfully, and from a premeditated design to effect the death of the said Carmella Coppolino, kill and murder the said Carmella Coppolino, contrary to the form

of the statute in such cases made and provided and against the peace and dignity of the State of Florida.

(s) FRANK SCHAUB
FRANK SCHAUB, *as State Attorney for the Twelfth Judicial Circuit of the State of Florida*

Appendix D

Case No. 2389

STATE OF FLORIDA
v.
CARL COPPOLINO

BILL OF PARTICULARS

Pursuant to order of Court, the State furnishes to the defense the following information:

Couse of Death: The State of Florida respectfully shows to the Court that the indictment found by the Grand Jury herein is based upon the holding of the case of *Houston* v. *State,* 50 Fla. 90, 39 So. 468. The undersigned State Attorney further shows that it is his belief that the evidence herein will show that Carmela Coppolino, also known as Carmella Coppolino, died as alleged in the indictment filed herein and not from a coronary occlusion or from other natural causes, but from a certain drug commonly called succinylcholine, and that the said death was the result of the criminal agency or act of another, to-wit: Carl Coppolino.

(Witness List Omitted)

Appendix E

PORTION STENOGRAPHIC TRANSCRIPT OF TRIAL

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Mr. Bailey: The posture of the scientific evidence is certainly somewhat confusing at this point. I assume the court has some notes. Because of the manner and speed in which it came in, it will not be sufficient to reconstruct it completely so I will resort to my recollection.

The case is defective if there is not sufficient proof as will permit a man making a judgment as these jurors must do to say with certainty a cause of death shown as alleged in the indictment.

I understand the State is restricted to proof that she died from succinylcholine chloride because of the particulars as against a vague indictment.

We have bandied about reasonable medical certainty, which in some sense is a civil term used in civil cases; and notwithstanding everything that has been said by the witnessess describing the strength of their own opinions, whether or not the opinions are sufficient, not only in the predicate but on the way the witness describes them in his own semantics to rise to the level of proof beyond a reasonable doubt, is not a judgment for the witness but the court.

Unless you get by issue number one as to the cause of death shown, you need not reach number two, the defects in the testimony which render the ultimate opinion—and we deal only with Dr. Helpern's because most of what can be said about him can be said also about Dr. Cleveland, who is rather hypothetical, we suggest to the court—is an inadequate basis to send this case to the jury.

Dr. Helpern said, "In my opinion the cause of death is

the drug," and that opinion is what holds this case up if it can be held up.

He said two things contradictory. He said, "My opinion is based on Dr. Umberger's findings," and he said, "My opinion is based on Dr. Umberger's opinion."

The court is to judge whether or not Dr. Helpern could possibly interpret the findings claimed to be made.

We have this at several levels. It was developed yesterday somewhat to the surprise of the court that the sequence of events was as follows: The defendant was indicted July 25 pursuant to information received by phone from Dr. Helpern and related to the Grand Jury.

Dr. Umberger, two weeks before the testimony of September 12, which Dr. Helpern assured this court, furnished a preliminary report which used the word "possible," which was changed by Dr. Helpern because he was dissatisfied.

That report indicated no quantities, only the findings. Dr. Umberger testified yesterday he could not say at that time the presence was normal or abnormal because no quantities were isolated. He was not able at any time to say what normal quantities would be there, although he did accept 40 milligrams.

Subsequent to that, Dr. Helpern came and testified, and then the work, it appears, began in earnest to support the opinion that had been cast into the law by Dr. Helpern. Certainly this is not an ethical way to put together a murder case.

It is sufficient grounds for this court to issue an instruction on the credibility of Dr. Helpern. Dr. Helpern, no matter if he testified until he is blue in the face, cannot strengthen the testimony of Dr. Umberger.

I brought Dr. Umberger back here for several reasons. I call the court's attention to his final statement. He said, "If I have given any indication that I could find a stronger

than a possible source I now retract it," and these remarks appear at the very end of his testimony yesterday.

If he can say no more than possible, this is not evidence. This is a suspicion. Beyond that, Dr. Umberger, indicates a fatal defect in his opinion. He said, "Had I not been given a history of succinylcholine chloride, I could not have an opinion." It is the succinic acid standing by itself. That is the only thing he claims to have any significance in his findings.

An expert witness may not have assumed the ultimate fact in issue; that is, was there an injection, as part of his opinion. This is precisely what Dr. Umberger has done and told us, so his opinion is defective.

If his opinion findings, or however you choose to term it, fall, the case must fall.

Dr. Helpern did not hold it together by no other claim of cause of death. He has admitted causes of death are never traced and admitted, because of death an insulin shot could never had been demonstrated in an embalmed body.

Dr. LaDu said he has not changed his statement:

> "I did not have enough material to make findings enough to find the drug."

That is not sufficient predicate, which must stand in the case of all reasonable doubt. That was all that Dr. LaDu said.

The entire posture of the case is there is no way in the world to assure the jury that the experimentation done has any validity because there is nothing to measure it off against.

The State must be penalized, because although Dr. Umberger says he didn't have time, this is a pretty poor excuse for not even going so far to check an embalmed brain to demonstrate this is different from others. The failure to do this is a defect in the entire examination.

I ask the court to pass on the validity of the findings which their author admits not sufficiently certain to be the subject of a publication, and to nonetheless have this court rule that scientifically they come up to the standard to put a man to death. I do not understand how a man could even be tried on evidence and on information of a scientific nature which is supposed to demonstrate guilt beyond a reasonable doubt in a circumstantial case when the findings are not punishable, because these are too speculative and unauthenticated.

If it please the court, the case goes beyond whether or not Dr. Coppolino runs the risk of a jury verdict. If the jury acquits, that makes moot a necessity for the court to consider this motion. Your honor must assume that the jury will convict and determine what must be done about it.

It is unfair to the public that has confidence in jury verdicts, it is unfair to the public to allow the case, known to be inadequate, to go to a jury which may convict and then for the court to take the case away.

It brings I'd say criticism upon the court, because the public can correctly say, "If it was that weak it shouldn't be sent in the first place and we should not be robbed of our justice."

I realize that the idea of permitting a jury to act first in order to see whether the court is going to take action is attractive; but on the other hand, it is a step down the primrose path.

There is no requirement in the law that it takes more law to put a man to death than to convict. The standard is the same. If your honor finds he could not sit in his court and permit the defendant to die on the evidence heard, then that evidence is insufficient.

* * * *

Having all of these things in mind, grant now the demise of this case. It is a case that would never permit

the conscience of a judge or lawyer to rest that would cause the imprisonment of Dr. Coppolino because the uncertainty will always be there as to how his wife died. Having those things in mind, we ask you to give consideration prior to the time the case is argued or prior to the time you permit the jury to have it on the grounds stated and for the reasons given.

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Mr. Georiff

Everything Mr. Bailey said in my estimation has nothing to do with a directed verdict unless he can demonstrate absolutely there was no credible evidence on the necessary elements of the crime to let it go to the jury.

When you move for a directed verdict, at least in law, you admit the existence of every element of the crime. What you must maintain is that it is there in so low a quantum or in fact does not exist to let the jury consider it.

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Now, everything you have been asked here today descends to one thing. They have suggested that because this could not possibly reach the level of beyond a reasonable doubt—and lets take it further to a moral certainty —that you should take it away from the jury. That is not the posture of an argument regarding directed verdict, and that is an argument for the jury.

I submit the request for a directed verdict must demonstrate to your satisfaction as a matter of law that there is absolutely not enough here for that jury to reach any conclusion, not one beyond a reasonable doubt, but it has to be such that you can't even give it to them. I do not believe that that is the state of the case.

And if I continued any further I suppose all I would do is repeat. I am not going through the testimony of the doctors or the other people. I will simply say that everything that Mr. Bailey said the witnesses said is something for the jury.

Based on the theory that it has not reached that level

of reasonable doubt is unconscionable and the motion ought to be denied.

The Court: I will let you gentlemen know shortly on that. Bring in the jury.

APPENDIX F

782.04 MURDER

The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping, shall be murder in the first degree, and shall be punishable by death.

When perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, it shall be murder in the second degree, and shall be punishable by imprisonment in the state prison for life, or for any number of years not less than twenty years.

When perpetrated without any design to effect death, by a person engaged in the commission of any felony, other than arson, rape, robbery, burglary, the abominable and detestable crime against nature, or kidnapping, it shall be murder in the third degree, and shall be punished by imprisonment in the state prison not exceeding twenty years.

782.07 MANSLAUGHTER

The killing of a human being by the act, procurement or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide nor murder, according to the provisions of this chapter, shall be deemed manslaughter, and shall be punished by imprisonment in the state prison not exceeding twenty years, or imprisonment in the county jail not exceeding one year, or by fine not exceeding five thousand dollars.